IN THE MATTER OF LICENSE NO. 356390
Issued to: Albert E. FRACCARO, Z-6201

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1993

Albert E. FRACCARO

Appellant appeals under 46 U.S.C. 239(g) and 46 CFR 137.30-1 from three orders entered by an Administrative Law Judge of the U. S. Coast Guard after hearing held at Oswego, New York, on several dates in April 1969. The charges of misconduct all involved service as a Great Lakes pilot aboard three foreign vessels: M/V SAKUMO LAGOON, M/V BENGKALIS, and M/V THERON.

On 28 January 1969, Appellant was served with charges of misconduct for hearing to commence on 16 April 1969. The offenses alleged were that while serving under authority of his license as pilot:

(1) aboard the Ghanian SAKUMO LAGOON on 25 September 1968, Appellant overtook SS CARSON J. CALLAWAY in the St. Lawrence River without obtaining a whistle signal assenting to an overtaking proposal in violation of 33 CFR 90.8, and

(2) aboard the Canadian THERON on 30 November 1968 navigated the vessel on the St. Lawrence River in excess of the prescribed speed.

Another charge of misconduct dated 10 March 1969 was served on Appellant alleging that while serving under authority of his license as pilot aboard the Netherlands BENGKALIS on 21 October 1968, he brought into the United States certain merchandise, binoculars, which could not lawfully be entered until "certain formalities required by the Bureau of Customs had been met, to wit, declare dutiable merchandise (19 CFR 23.4)."

Hearing was held, with Appellant represented by professional counsel, in a manner approaching the customary, i.e.. evidence was presented. After hearing, the Administrative Law Judge issued three separate decisions and orders, each dealing solely with the allegations concerned with one of the three ships. The SAKUMO LAGOON order was dated 19 June 1969, that relative to the BENGKALIS incident on 23 July 1969, and that for the THERON matter on 12 August 1969.

all three allegations of misconduct were found proved and three orders of suspension were entered. (Because of the action to be taken, these orders are not here spelled out in detail.)

The decisions were served at intervals. By the time the third decision had been entered two notices of appeal had been filed. Appeal was timely filed from the third decision also. Appeal was perfected in timely fashion after delivery to Counsel of five volumes of transcript of proceedings.

Findings of Fact

On each date in question Appellant was serving under authority of his license as pilot of the vessels named.

Because of the confusion of this record and the disposition to be made of the case, detailed findings of fact are omitted. Certain facts of critical importance are discussed in the OPINION as needed to reach a proper disposition of the case.

BASES OF APPEAL

The three appeals entered here, which I consolidate and treat as one appeal, are from the findings and orders entered by the Administrative Law Judge.

Appellant's voluminous assertions and arguments may be summarized as follows:

(1) As to the BENGKALIS incident the evidence did not establish a violation of 19 CFR 23.4;

(2) as to the SAKUMO LAGOON incident, the evidence did not establish a violation of 33 CFR 90.8; and

(3) as to the THERON incident the charge could not be found proved because the regulation setting the speed limit is ambiguous in not specifying a standard of "statute miles per hour" and because in calling for a speed of eleven miles an hour Appellant had a right to rely on the master who, in fact, set a speed of eleven knots.

Appearance: Creary, Ray and Robinson, Cleveland, O., by John D. Kelleher, Esq.

OPINION

I

At the outset it is necessary to sort out some of the procedures followed in this case.

After service of the charges on Appellant his counsel, by letter, demanded of OCMI, Oswego, that three separate hearings be accorded to Appellant. OCMI, Oswego, refused to agree to three separate hearings, and Counsel requested the identity of the Administrative Law Judge assigned to the matter so that he could press his demand for three hearings. There is apparently, here, a void in the record. The next document presented is a transcript of proceedings in open hearing which reflects neither three separate hearings on three separate charges nor, at least in conventional fashion, one hearing on one charge of misconduct supported by three specifications.

The transcript itself is puzzling. It appears in five volumes, numbered and paginated consecutively. The five volumes do not proceed chronologically, however. Neither do they proceed from beginnings to conclusions as though three separate cases has been heard. Thee is a jumping back and forth between matters and one and another specification. General rulings and statements are made, applicable to the totality of proceedings, in parts of the record purporting to deal exclusively with matters of one specification. It is obvious that many off-the-record transactions took place.

there is no useful purpose to be served in presenting a tabulation of dates and times of day of hearing against matters involved in each specification. I conclude that despite the appearance that the Administrative Law Judge granted an unrecorded motion to sever the allegations against Appellant into three separate hearings and issued three separate decisions there was but one hearing on three specifications of misconduct aboard three ships. I also conclude that although the Record generates confusion it is sufficiently dispositive of the matters involved.

II

On the merits of the "unlawful landing of dutiable merchandise" from BENGKALIS, it is admitted that Appellant purchased a pair of binoculars aboard the vessel.

Under the procedure set up for Great Lakes pilots in the area, it was not necessary for a pilot to report to Customs at all if landing after 1700 on weekdays or on Sunday, unless dutiable merchandise was landed. In that case the pilot was required to report to the nearest Customs office or (if the office was closed) to the Thousand Islands Bridge Station (obviously by telephone). the procedure did not, of course, prohibit landing, as such, of

dutiable merchandise prior to reporting. It permitted the landing subject to the condition that it be reported (if, as in this case, after 1700) in one of two ways. The regulation cited in the specification in effect at that time, declares that in the event of failure to declare dutiable merchandise or of the making of a false declaration the merchandise is liable to seizure. The specification here is inartfully drawn but it may be fairly inferred to allege a landing that would render the property subject to seizure.

Appellant landed from the ship at Cape vincent, N.Y., after 1700. He proceeded into the pilot station building. Whether he was aware of it or not he was under surveillance by a Customs officer who followed him into the building. When the officer entered the office space Appellant was out of sight in the head. The officer heard a noise from inside as of something failing to the floor. Appellant came out of the head carrying an overnight case. The officer asked him whether he had anything to declare. Appellant questioned the officer's presence in the pilot's office. The officer pointed to a long-posted sign which announced that the pilot station would be the place for making reports to Customs. He repeated his question and Appellant replied that he had binoculars. (Some time between Appellant's coming out of the head and this moment, not clear on the record, the officer had looked in the head and had seen some object in a trash can, an object which he did not seek to identify.) It does not appear that the binoculars were seized, nor whether duty was paid. It may be assumed from Appellant's declaration that the merchandise was in fact dutiable.

The Administrative Law Judge formally found the specification proved but in fact he found, three months after the proceedings in open hearing, that Appellant had failed to make a timely report. The specification as alleged was not proved and appellant was not charged with failure to make a timely report. What might constitute a timely or an untimely report was never argued or even discussed at hearing. The weakening of possibly justified inferences in support of a poorly drawn specification to reach a finding on an unmitigated matter with an undefined standard of conduct results in a finding of no misconduct at all.

III

With respect to the specification dealing with the overtaking of CARSON J. CALLAWAY it was recognized throughout the proceeding, including the decision, that no collision occurred and that there was no question of the passing's being the cause of a sheer taken by CALLAWAY resulting in a "touch and go" grounding. The specification admits of a situation, and the Administrative Law

Judge found a situation, in which SAKUMO LAGOON blew a two blast overtaking signal and successfully overtook and passed on the port side of CALLAWAY without having received an assent to its two blasts.A violation of the Rules of the Road, statutory or regulatory, is misconduct within the meaning of 46 CFR 137.05-20 whether or not there is a collision. What constitutes a violation of the Rules is ultimately decided by a Federal court, almost inevitably in a collision case. While the considerations in judging misconduct or negligence on the part of a pilot are not identical with those in ascertaining fault and liability in collision, the interpretation of the rules by the courts is an influential element in the former kind of analysis.

33 CFR 90.8, dealing with the overtaking situation on the Great Lakes is a supplementary regulation issued under 33 U.S.C. 243 to specify details as to how 33 U.S.C. 287, the general rule for overtaking, is to be implemented. This section of the regulations does not appear to have been construed by a court, but it almost exactly tracks Rule VIII of 33 U.S.C. 203 in the Inland Rules. The decisions construing Rule VIII are pertinent. The rule does not expressly prohibit overtaking without receipt of a reply. What it does prohibit is overtaking after a danger signal has been given in reply to a proposal. Language in The Mesaba, D.C.S.D. N.Y. (1901), 111 Fed 215, makes it clear that courts and other authorities have not always scrutinized the statements in Rule VIII closely. The cited decision allows that an overtaking vessel may properly pass an overtaken vessel without having received an assent to its proposal when the situation is clearly safe for such a maneuver and the cooperation of the other vessel is not required, and no collision occurs.

Misunderstandings of the Rule have arisen because of incomplete quotation. The reference is often made to the statute by beginning with the words, "under no circumstances..." without adverting to the fact that the prohibition is already limited by earlier words to the cases in which the danger signal has been given by the overtaken vessel. The semicolons are of significance in the rule. The words of absolute prohibition apply only to the last independent clause of the sentence. The rule is not intended to allow the overtaken vessel to deny an otherwise safe passing by deliberate or negligent silence. The Administrative Law Judge in his decision paraphrases a statement made in Decision on Appeal No. 727. He says:

> "...the Commandant of the Coast Guard has ...ruled that for the overtaking vessel to attempt to pass without having obtained that assent is a fault. See Appeal Decision ...No. 724, where the Commandant said that the weight of authority to

that effect is "overwhelming.'"

What was actually said in that decision was that when an overtaking was undertaken without an assent the weight of decision was "overwhelming" that the overtaking vessel is at fault in any resulting collision; but when, as here, there is no collision or even embarrassment, the pertinent part of the rule is directory. The overtaking is no ipso facto misconduct.

I emphasize here, to preclude misunderstanding, that this case is different from a violation of the "moderate speed" rule under which, in evaluating the conduct of a pilot or a master, it is immaterial whether a collision occurs.

IV

There remains one element to be considered in the CALLAWAY matter. The Administrative Law Judge did find that CALLAWAY sounded a danger signal. The evidence indicates that CALLAWAY first sounded a "check signal." What this is, under the laws of regulations governing navigation on the St. Lawrence, I do not known and no explanation is attempted in the record. On the times given in the record, it may be concluded that CALLAWAY's danger signal came when SAGUMO LAGOON's stem was about 250 feet Laterally from CALLAWAY's stern. SAGUMO LAGOON was proceeding at a rate of speed of six miles an hour more than CALLAWAY's. (Consistent with comment made later on the speed matter, and as most unfavorable to Appellant anyway, I take this to mean six statute miles per hour.) Appellant's vessel was gaining on CALLAWAY at the rate of 528 feet per minute. Thus, less than one half minute after CALLAWAY's "danger signal," SAGUMO LAGOON's length would begin to overlap that of the overtaken vessel. Without any attempt to translate this into terms of mass and moment it is evident that this signal came far too late to place an absolute burden on Appellant not to attempt to pass.

An additional factor here is that CALLAWAY's signal was not given to warn against possible collision, of which there was apparently no danger, but was made as a sign of apprehension as to SAGUMO LAGOON's rate of speed. Assuming some propriety for such use of the signal, it was still ineffectively untimely whatever backing power Appellant's vessel might have had. Furthermore, I am strongly affected here by the fact that by radiotelephone communication CALLAWAY had twice assented to an overtaking on the port hand. Had Appellant failed to sound a whistle signal after

such assents by voice communication there might have been a technical violation of the regulation, in the evaluation of which the absence of collision would be weighted. Since he did make the sound signal called for, it would be unconscionable to attempt to stretch the rule in view of the actual happenings.

V

Appellant's principal argument on the question of speed of THERON in excess of the prescribed limits is that the regulation, 33 CFR 207.611, is ambiguous in that it did not at the time expressly state whether the limit is in statute or nautical miles per hour. It is true that some Army regulations for speed in the Great Lakes did specify statute miles in some cases and not in others and that in the Coast Guard regulations for the St. Mary's River "statute miles" were specified. Army regulations for areas other than the Great Lakes seem invariably to speak of "nautical miles per hour" or "knots". But a pilot, well versed in chart use in the Great Lakes, and the holder of the first numbered commission for District One under the Great Lakes Pilotage Administration, cannot be heard to feign doubt about the meaning of the regulation here. Further, for a defense here, he would have to argue not only intrinsic ambiguity but actual misunderstanding. This argument of Appellant must be rejected.

In his favor on this matter is the fact that he advised the master of the vessel that they were approaching a speed zone. The master ordered a reduction of speed. This speed clearly seems to have been eleven knots, according to the information provided as to ship's characteristics. There is confirmation of this in that the monitored speed of the vessel was 12.7 statute miles per hour which is almost precisely 11 knots. It is quite likely that the master did not understand that statute miles were the standard. But it is precisely a duty of a pilot to use local knowledge in aid of a master.

The Administrative Law Judge quotes 46 U.S.C. 216a as to the duties of a registered Great Lakes pilot. I cannot agree with his conclusion that, "His duty then was to be more than a mere advisor to the officers of the vessel...He is a temporary master while piloting in his area." This flies in the face of the statutory provision, "subject to the customary authority of the Master." I do not believe that the Great Lakes Pilotage Act imposes a greater duty on pilots than that placed by State or other Federal law on pilots of "seagoing" vessels. As already mentioned, it was, without venture into new concepts of pilotage, a duty of Appellant to insure that the master correctly understood the speed limit and he cannot now claim a right to rely upon a foreign seagoing master's knowledge that eleven statute miles per hour were meant on

Great Lakes waters. In fact, it is inconsistent for Appellant at the same time to seek refuge in the master's supposed error and to invoke ambiguity in the regulation.

VI

The needless complexity introduced into this case by the "three hearing" concept (not consistently applied) resulted in three separate and confused orders directed to Appellant's license. In view of my belief that only one specification of misconduct was found proved, and of the single order which I shall enter, the difficulties involved need not be explored in detail. It is desirable to point out, however, that, without explanation, one and only one of the orders purports to reach Appellant's "Merchant Mariner's Document." More precisely, the order suspends Appellant's license but calls for the surrender of the Merchant Mariner's Document. No merchant mariner's document was a condition of employment in this case and the order, to that extent, was invalid.

CONCLUSION

Since the trappings of "three hearings" are improperly assumed here, I conclude that here was one hearing and I have consolidated the three appeals. This Decision disposes of the whole matter.

ORDER

The findings and orders of the Administrative Law Judge relative to the allegations of misconduct aboard BENGKALIS and SAKUMO LAGOON are SET ASIDE and the specifications are DISMISSED. The finding of Misconduct in that THERON was navigated at a speed greater than that prescribed by regulation is AFFIRMED and the order pursuant thereto is MODIFIED to provide that Appellant is ADMONISHED for the misconduct found proved.

C. R. BENDER
Admiral, U. S. Coast Guard
COMMANDANT

Signed at Washington, D. C., this 30th day of December 1973.

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